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OFFICE OF THE
EXECUTIVE SECRETARY

August 14, 2000

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: *Tariff Filing of BellSouth Telecommunications, Inc. to Reduce
Grouping Rates in Rate Group 5 and to Implement a 3% Late Payment
Charge*
Docket No. 00-00041

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Response to Consumer Advocate Division's Petition for Stay. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Patrick W. Turner

PWT/jem

Enclosure

POSTED
8/15/00

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth Telecommunications, Inc.'s Tariff Filing to Reduce Grouping Rates in Rate Group 5 and to Implement a 3% Late Charge*

Docket No. 00-00041

BELLSOUTH TELECOMMUNICATIONS, INC.'S
RESPONSE TO CONSUMER ADVOCATE DIVISION'S
PETITION FOR STAY

I. INTRODUCTION

Although the "Petition for Stay of Effectiveness" filed by the Consumer Advocate Division contains 43 paragraphs of allegations, most of these allegations have already been considered and rejected by the Tennessee Regulatory Authority ("TRA"). Additionally, none of the CAD's newest arguments warrants a different outcome, let alone issuance of a stay. Indeed, the CAD never discusses the standards for obtaining a stay, which is not surprising since the CAD cannot meet them. Accordingly, the CAD's petition should be denied.

II. DISCUSSION

A. The CAD Cannot Satisfy The Standards For Issuance Of A Stay Pending Appeal.

Tennessee Code Annotated Section 4-5-316 authorizes an administrative agency to stay the effectiveness of an order of that agency. Although the statute does not identify the standards that should be considered, most courts consider four factors in deciding whether to grant a stay: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the

moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the stay is granted; and (4) the public interest in granting the stay. *See Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *In re: DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985). Here, the CAD cannot satisfy any of these requirements.

1. Likelihood of success on the merits

A party seeking a stay often has considerable difficulty in demonstrating a likelihood of success on the merits. This is because the party ordinarily must demonstrate that there exists "a likelihood of reversal." *Griepentrog*, 945 F.2d at 153. Indeed, even if a moving party "demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if the stay is granted, he is still required to show, at a minimum, serious questions going to the merits." *Id.* at 153-54 (quotations omitted). Although the CAD offers a litany of alleged errors by the TRA, none has merit or establishes any likelihood that the TRA's Order Reversing Initial Order and Approving Tariff will be reversed.

In an all-too-familiar refrain, the CAD once again argues that its procedural and substantive due process rights have been violated. This time, the CAD alleges that the violation occurred because the TRA approved BellSouth's tariff "without permitting Tennessee consumers to present or provide cross-examination of all of the evidence" *See* Petition at ¶¶1-5. These allegations, however, ignore the fact that the two agreed-upon issues in this docket are legal in nature. *See* Order Reversing Initial Order and Approving Tariff at 3. Moreover, the CAD was given

ample opportunity to address these legal issues in this docket -- the CAD received more than a thousand pages of documents in discovery, it submitted both an initial brief and a reply brief in this docket, and both BellSouth and the CAD presented "extensive oral arguments" to the Directors during the July 11, 2000 Authority Conference. See Order Reversing Initial Order and Approving Tariff at 4. The CAD's substantive and procedural due process rights were not violated.

The CAD's Petition also asserts that the TRA's "decision is contrary to the legislative intent of Tenn. Code Ann. § 65-4-125(b)" See Petition at ¶¶6-12. In support of these assertions, the CAD states that the TRA's Order "permits BellSouth to bill and collect charges for services it knew or should know were not ordered by consumers." BellSouth, however, only sends a bill to persons or entities who subscribe to BellSouth services, *see, e.g.*, GSST A37.1.1.A, and BellSouth's tariffs govern the manner in which BellSouth's subscribers must pay their bills. See BellSouth's Tennessee General Subscriber Services Tariff ("GSST") at A2.4.3 ("Payment for Service"). These subscribers are aware of the fact that the charges for the services provided by these third parties will appear on their local telephone bills, *see, e.g.*, A37.1.4.E,¹ and by virtue of BellSouth's approved tariff, they are

¹ See also AT&T's Tennessee General Services Tariff A2.4.3.G. (applying a late payment charge to "all amounts previously billed on a Customer's bill," but expressly stating that "[w]hen a local exchange company provides the billing function on behalf of [AT&T], the local exchange company's late payment charge applies."); Sprint Tennessee Tariff P.S.C. No. 3, §3.8.2. ("Subscribers billed by a local exchange company (LEC) on behalf of [Sprint] are responsible for any late-payment charges that the LEC may employ in its billing process."). As the CAD acknowledges, end users benefit from having these charges appear on their local

charged with the knowledge that a late payment charge will apply to any balance that remains unpaid by the next billing date. *See GBM Communications, Inc. v. United Inter-Mountain Tel. Co.*, 723 S.W.2d 109, 112 (Tenn. Ct. App. 1986) ("The published tariffs of a common carrier are binding upon the carrier and its customers and have the effect of law. The provisions of the tariffs should govern the parties."). Additionally, before applying the late payment charge to any end user's unpaid balance, BellSouth plans to place a message on its bills which will notify its customers of the date after which BellSouth will begin applying the late payment charge to unpaid balances.

The CAD also asserts that the TRA's Order permits BellSouth "to bill and collect charges for services it knew or should have known are not and were not in the tariff or contract." *See* Petition ¶10. This assertion, however, simply ignores the fact that the late payment charge is now specified in the tariff, and applying the charges simply does not violate the statutory prohibition against billing "any amount in excess of that specified in the tariff or contract governing the charges for such services." *See* Tenn. Code Ann. §65-4-125(b).

The CAD also protests that the Order violates the statutory freeze on basic rates. *See* Petition at ¶¶ 13-17. These protestations, however, simply repeat arguments the CAD has already made and lost in this proceeding. Moreover, these arguments are fully refuted by the "Brief of BellSouth Telecommunications, Inc.

bill because they have to pay one bill instead of several. *See* CAD's Briefed Issues at 12.

Addressing the Issues Presented" and by the "Reply of BellSouth Telecommunications, Inc. to the CAD's Briefed Issues" that were filed in this docket.

In a similar argument, the CAD objects to Director Greer's observation that the TRA has classified United Telephone-Southeast's late payment charges as non-basic and that the CAD did not appeal that classification. See Petition at ¶¶ 20, 37. There is little doubt that the CAD does not appreciate this observation, given that it completely eviscerates its argument that the late payment charge is a charge for a basic service. All the CAD can do, however, is claim that United's late payment charge "was in effect prior to June 6, 1995 or is otherwise not relevant to the decision in this case," See Petition at ¶27, and this claim simply misses the mark. Regardless of whether this late payment charge existed before 1995, the TRA clearly has designated the charge as "non-basic" and the CAD did not challenge this designation. Director Greer's observation, therefore, is both relevant and controlling.

Similarly, the CAD's assertion that "BellSouth's late payment charge is an extortion in violation of Tenn. Code Ann. §65-4-122(b)" is simply meritless. See Petition at ¶23. Under that statute, extortion occurs when a company "charges, collects, or receives more than a just and reasonable rate of toll or compensation for service" T.C.A. §65-4-122(b) (emphasis added). For companies operating under an approved price regulation plan, however, rates for telecommunications services "are just and reasonable when they are determined to

be affordable as set forth in this section." See T.C.A. § 65-5-209(a) (emphasis added). Moreover, once a company's application for price regulation has been approved, the company is "empowered to, and shall charge and collect only such rates that are less than or equal to the maximum permitted by this section" T.C.A. §65-5-209(b). The information provided in BellSouth's tariff filing package and in its discovery responses clearly supports the TRA's determination that the rates set forth in BellSouth's tariff are less than or equal to the maximum permitted by BellSouth's price regulation plan. Because BellSouth's rates are just and reasonable, they simply cannot be "more than just and reasonable" and, therefore, they are not extortionate. See T.C.A. §65-5-209(a).

The CAD also attacks the TRA's Order by alleging that it is "is anticompetitive and contrary to legislative intent because the TRA has created a right in BellSouth as a billing aggregator that other non-regulated billing aggregators do not have under state law." See Petition at ¶¶ 24-36, ¶ 25. This allegation ignores the fact that unregulated entities collect late payment charges on a daily basis pursuant to the common law of contracts. For a regulated entity like BellSouth, the tariff serves as the contract between the company and the subscriber. As explained at pages 3 through 8 of the "Reply of BellSouth Telecommunications, Inc. to the CAD's Briefed Issues," the TRA clearly has the authority to approve a tariff that applies a late payment charge to all amounts appearing on BellSouth's bills, including amounts for services provided by third parties. The CAD's assertions to the contrary are simply wrong.

Finally, the CAD claims that "the majority decision does not permit development of the record regarding rate discrimination and the application of BellSouth's grouping discounts." See Petition at ¶43. To the extent that there has been no development of the record on this point, it is because the CAD never made any attempts at any such development. This point is not raised or addressed in the list of issues jointly submitted by the parties, and it is not raised or addressed in any of the 45 discovery requests the CAD served upon BellSouth. It is not raised or addressed in the "Reasons Warranting Discovery" filed by the CAD, and it is not raised or addressed in the "Initial Briefing Issues." Nor is it raised or addressed in the initial brief submitted by the CAD or in the CAD's "Response to Brief of BellSouth." Nothing whatsoever prevented the "development of the record" on this point. The simple fact is that the CAD never attempted to raise or address this point in this docket.²

2. Irreparable injury

The CAD's only attempt to address the "irreparable injury" factor is to claim that "irreparable damages" will occur if a subscriber's service is "terminated for non-payment of BellSouth's new charge." See Petition ¶¶18-19; 21-22; 39-42. This argument, however, ignores the fact that non-payment of the charges for many regulated services can result in termination of a subscriber's service. Under

² Additionally, charging different rates in different rate groups is a valid regulatory practice that has been permitted by the TRA and by its predecessor, the Tennessee Public Service Commission, for many, many years. It is neither novel nor discriminatory.

the CAD's reasoning, therefore, the CAD arguably could make an irreparable harm showing any time the TRA enters an Order approving a rate or charge with which the CAD disagrees -- a result that clearly is illogical and contrary to the law.

Additionally, the "harm" alleged by the CAD is far from irreparable. If a customer's service is terminated for non-payment of charges, the service will be restored upon payment of such charges. Additionally, the "harm" alleged by the CAD is altogether avoidable -- subscribers will not even be assessed a late payment charge if they do what they have agreed to do in the first place -- pay their bills on time. The CAD, therefore, cannot make a showing of irreparable injury.

3. Public interest

As BellSouth explained throughout these proceedings, BellSouth's tariff constitutes a rate increase only for those subscribers who do not pay their bills on time. Rather than filing for an across-the-board rate increase which would affect all or most of its subscribers in the State of Tennessee, BellSouth's late payment charge is applied only to those customers who cause BellSouth to incur additional costs by not paying their bills on time. As noted in BellSouth's discovery responses, the majority of BellSouth's subscribers do pay their bills on time and, therefore, will not be affected by this tariff. It is hardly contrary to the public interest to approve a tariff that applies a late charge only to those subscribers who cause BellSouth to incur costs when they do not pay their bills on time.

Moreover, the public interest is protected because BellSouth provides its customers with options to avoid or lessen the impact of late payment charges. For

example, low income residential customers who qualify for the Lifeline program may obtain a credit of up to \$11.35 toward their basic local exchange telephone service. See General Subscriber Services Tariff at A3.31. Additionally, low income customers who qualify for the Link Up program may obtain a credit of up to 50% of their non-recurring charges for the connection of service, up to a maximum of \$30.00. *Id.* at A4.7.1. BellSouth also recently implemented a credit challenged initiative for residential subscribers. See General Subscriber Services Tariff §A2.4.3.H. This tariffed initiative allows residential subscribers whose service has been temporarily suspended due to nonpayment of regulated charges to retain their local service if they elect full toll restriction (at no charge) and arrange to pay their overdue charges on an installment basis over up to twelve months.

Finally, granting the stay requested by the CAD clearly is against the public interest. The tariff provides lower hunting rates to every BellSouth subscriber in Rate Group 5. Granting the CAD's request for a stay would deny these subscribers the benefit of these lower rates. It is in the public interest, therefore, to deny the CAD's Petition for a Stay.

III. CONCLUSION

For the foregoing reasons, the Authority should deny the CAD's Petition for Stay of Effectiveness.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read "Patrick W. Turner", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

☐ Hand
☒ Mail
☒ Facsimile
☐ Overnight

L. Vincent Williams, Esquire
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Nashville, Tennessee 37243


